BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK,

Petitioner,

—v.—

SOLOMON A. KLEIN,

Respondent.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

JOHN G. BONOMI
Attorney for the Association of the Bar of the City of New York as Amicus Curiae
36 West 44th Street
New York, N. Y. 10036
212 MUrray Hill 2-0606

MICHAEL FRANCK
PETER J. O'CONNOR
Of Counsel

BLANK

PAGE

INDEX

TABLE OF AUTHORITIES

Cases:

PAGE

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK,

Petitioner,

—v.—

SOLOMON A. KLEIN,

Respondent.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

Statement of Interest

The Association of the Bar of the City of New York has a membership of over 8,700 lawyers. It was incorporated by the New York State Legislature for the purpose, in part, of "maintaining the honor and dignity of the profession of the law" and "increasing its usefulness in promoting the due administration of justice". Since 1870 it has maintained a Committee on Grievances which has served as an agency of the Appellate Division, First Department, in maintaining high standards of ethics among the members of the Bar in its jurisdiction, *Matter of Branch*, 178 App. Div. 585 (1st Dept. 1917).

The determination of questions presented on this appeal will affect the procedures of this Association's Committee

on Grievances as well as those of the Co-ordinating Committee on Discipline* in which this Association participates. It will also have consequences of great public concern. For these reasons, the Association has requested and obtained the consent of the parties to this appeal to file a brief *amicus curiae*. The Association supports the position of the Respondent.

Opinions Below

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, ordering Petitioner's disbarment is reported as *Matter of Spevack* in 24 A. D. 2d 653 (2d Dept. 1965). Affirmance by the Court of Appeals of the State of New York may be found at 16 N. Y. 2d 1048 (1965), and the amended remittitur at 17 N. Y. 2d 490 (1966).

Jurisdiction

This Court's jurisdiction rests on 28 U. S. C. §1257(3).

Constitutional Provisions, Statutes and Appellate Division Rules Involved

United States Constitution, Amendment V.

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . "

* The Co-ordinating Committee on Discipline was created in 1958 as a joint effort on the part of, and pursuant to a plan adopted by, the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department, the Association of the Bar of the City of New York, The New York County Lawyers' Association, and The Bronx County Bar Association, in order to survey and investigate the practices of attorneys and others engaged in the handling of claims for personal injuries in the First Judicial Department.

United States Constitution, Amendment XIV

"Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Judiciary Law, Section 90, Subdivision 2

"The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department.

"*Rule 3. Statements as to retainers in actions or claims arising from personal injuries or property damage and in condemnation or change of grade proceedings —blank retainers.* Every attorney who, in connection with any action or claim for damages for personal injuries or for property damage or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of

grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceedings, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury or damage or the title and description of the condemnation or change of grade proceeding, the date it was commenced and the number or other designation of the parcels affected.

"If the action or claim arises from personal injuries or property damage, it shall also be stated whether or not the client was personally known to the attorney prior to the date of injury or property damage, the name and address of any person or persons who referred the client to the attorney or who had any connection with referring the client to the attorney, stating the connection. This shall be stated if the attorney was retained or associated in any way in five or more claims made or actions instituted in the previous calendar year for personal injuries, property damage or both. (Par. added March 2, 1953.)

"Such statements may be filed personally by the attorney or his representative, or by registered mail.

Such statements may also be filed by ordinary mail, provided the statements are accompanied by a self-addressed stamped return postal card containing the date of the retainer and the name of the client. The postal card will be signed by the clerk of the court and mailed to the attorney, and it will serve as a receipt for the filing of the statement of retainer. (Par. am. Jan. 20, 1954.)

"No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney is left in blank at the time of its execution."

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Department.

"*Rule 5. Preservation of records of actions, claims and proceedings.* In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

Statement of the Case

1. *The Role of the Attorney as an Officer of the Court*

Historically, membership in the Bar has involved a unique duality. On the one hand, it furnishes the attorney with the purely private right to earn a living. On the other hand, it invests him with certain public responsibilities. As Dean Roscoe Pound stated in *Survey of the Legal Profession (The Lawyer from Antiquity to Modern Times)*, p. 5, a profession is "a group of men pursuing a learned art as a common calling in the spirit of public service,—no less a public service because it may incidentally be a means of livelihood." The attorney becomes "an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice"—*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-71 (1928). This concept of the attorney is not an abstraction for, in a very real sense, the layman's access to justice under the law is dependent upon the availability of competent and trustworthy counsel.

The State, by licensing the individual as an attorney, affords him the opportunity of earning a living by conferring upon him the right to participate in a public area of activity—the administration of justice. Recognizing the substantial public interest involved, the State grants this right subject to the assumption of certain basic responsibilities. Thus, the attorney may be assigned as counsel to an indigent defendant in a criminal case without compensation; is subject to the proscriptions of the Canons of Professional Ethics; and, in fulfilling his responsibilities to the court which appointed him, must answer all inquiries con-

cerning his use of the rights it has conferred upon him by the license to practice.

2. *The Use of the Contingent Fee as a Method of Financing Legal Services*

Petitioner's disbarment arises in the context of a judicial investigation into the conduct of attorneys engaged in the practice of negligence law on a contingent fee basis. Therefore, it is necessary to consider the circumstances surrounding this speculative method of financing personal injury claims in order to understand the proceedings below.

The contingent fee has recently been the subject of a monumental study under the auspices of the American Bar Foundation. See MacKinnon, *Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities* (1964). The contingent fee may be defined as "a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee" (MacKinnon at 3). Almost everywhere outside of the United States use of contingent fees is considered "contrary to the public interest, unprofessional, and even criminal" (*Id.* at 209). But in the United States it has come to be the established, if not the exclusive, method for financing personal injury claims, primarily because of the opportunity it offers those otherwise without funds to obtain legal representation and access to the processes of justice for the prosecution of their claims. Various types of contingent fees are also becoming increasingly frequent in other areas of legal practice (see generally *Id.* at 25-28).

The experience in the United States, and particularly New York, indicates that the contingent fee has been the subject of pervasive and continuing abuses. As early as 1908, after sixty years of experience with the contingent fee, the Committee on Contingent Fees of the New York State Bar Association reported that "what was intended as the poor man's fee has too often been seized as the lawyer's opportunity", 31 N. Y. S. B. A. Rep. 99, 100. Drawing primarily from the New York experience, MacKinnon (at 4-5) summarizes the difficulties which have arisen with the contingent fee and the criticisms which have been made of it as follows:

> "The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the bar's professional responsibilities, both in the case at hand and, more importantly, in the future. The major arguments against contingent fees are that the gamble on the outcome introduces a speculative attitude toward law practice which is inconsistent with the detachment essential to a profession and that, because of the contingency, there is an emphasis on winning which tends to reduce the lawyer's self-restraint in negotiation and trial advocacy, thereby endangering the effective operation of the adversary system of judicial administration. In addition, the financial rewards to the lawyer are so large as to encourage competitive solicitation of potential clients, impairing the professional disinterest necessary to sound advice to his client and weakening the ties between fellow lawyers which form one of the essential characteristics of a profession. Further, the lawyer acquires an interest in the lawsuit that might come be-

tween him and his client, not only concerning the amount of the fee but also over the control of the suit on such questions as to whether to accept an offer of settlement. Finally, it is argued that giving the lawyer the right to finance litigation tends to motivate him to stir up lawsuits, both those that are supportable but would not be brought on the client's initiative and those that are groundless but have nuisance value, thus adding to the burdens of already overcrowded courts and contributing to an undesirable litigious attitude in the community."

Despite these disadvantages inherent in the contingent fee, New York has determined that its continuance is necessary to place the courts of justice within reach of the indigent citizen with a meritorious cause of action who is unable to pay a fixed fee for representation by competent counsel. At the same time, the State, through the Appellate Division of the Supreme Court which is charged with the responsibility of supervising the conduct of attorneys, has taken steps to prevent the evils attendant upon the contingent fee.

3. *The Steps Taken by New York to Regulate the Use of the Contingent Fee*

The courts of New York have always had inherent power, irrespective of particular statutory authority, to supervise and regulate the legal profession, since lawyers are officers of the court, *In the Matter of H——*, 87 N. Y. 521, 524 (1882); *People ex rel. Karlin* v. *Culkin, supra;* accord *Ex parte Secombe,* 60 U. S. (19 How.) 9, 13 (1856). Proposals for reform, therefore, have generally been presented directly to the judges.

The first large-scale investigation of the contingent fee was undertaken by Justice Wasservogel of the New York Supreme Court in 1928. His report* and a subsequent report** in 1938 by Assistant District Attorney Bernard Botein (now Presiding Justice of the Appellate Division, First Department), disclosed a sordid picture of abuses against the unsophisticated and indigent client. Evidence unearthed during the inquiries revealed widespread ambulance chasing, champerty and maintenance, fee splitting, unauthorized and excessive charges, and outrageous overreaching. Justice Wasservogel recommended that " . . . all contingent retainers in actions for personal injuries should be placed under the supervision of the courts, in order adequately to protect claimants in their relations with attorneys, and to eradicate the abuses which have been practiced upon the courts by attorneys", 14 Mass. L. Q. at 6.

The next initiatives for reform resulted from a comment by the Appellate Division in an opinion rendered in *Buckley* v. *Surface Transportation Corp.*, 277 App. Div. 224, 226 (1st Dept. 1950). The Court criticized "what appears to be a growing practice of attorneys in personal injury actions requiring retainers of 50% from their clients irre-

---

* The full title is Wasservogel, *Report in the Matter of the Investigation Ordered by the Appellate Division of the Supreme Court in and for the First Judicial Department, by Order Dated February 7th, 1928, upon the Petition of the Association of the Bar of the City of New York, New York Lawyers Association and Bronx County Bar Association, for an Inquiry by the Court into Certain Abuses and Illegal and Improper Practices Alleged in the Petition* (Commonly referred to as *Ambulance Chasing*), 14 Mass. L. Q. 1 (November, 1928).

** *Report of the Special Committee on the Desirability of Judicial Regulation of Contingent Fees*, in Association of the Bar of the City of New York Yearbook 293 (1938).

spective of the services involved". The Appellate Division thereafter promulgated a rule fixing limits upon the size of the fee which an attorney could claim under a contingent fee arrangement. The court's power to promulgate such a rule was ultimately upheld by the Court of Appeals in *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959), *cert. denied*, 361 U. S. 374 (1960).

In order to assure compliance with the substantive provisions of its rules, the Appellate Division not only requires attorneys to file retainer statements in contingent fee cases but also to keep careful financial books and records of disbursements of their own funds and of the funds they maintain on behalf of their clients. This requirement was embodied in Rule 5 of the *Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department* promulgated by the Appellate Division of the New York Supreme Court, which provides that attorneys "preserve the pleadings, records, and other papers pertaining to [every] action, claim and proceeding, and also all data and memoranda of the disposition thereof, for a period of at least five years . . ."

The rules regulating contingent fee cases are, of course, not self-enforcing. Experience has demonstrated that reliance upon complaints of clients is totally impractical and ineffectual. Thus, the client, suffering from the injuries for which he seeks redress, impoverished by medical bills and unversed in the law, is rarely cognizant of his rights. As the Court of Appeals has noted in *Gair* v. *Peck, supra*, the duty and function of the Appellate Division to keep the house of the law in order does not, and cannot be permitted to, hinge upon whether clients in such circumstances have the stamina to assert their rights. Furthermore, it

is the rare client who will risk making a complaint, burdened with the knowledge that his attorney holds the purse strings to settlement.

To provide for effective enforcement of its rules, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, created, in 1957, pursuant to New York Judiciary Law §90 (2), the additional Special Term of the Supreme Court (Judicial Inquiry) for the purpose of investigating suspected illegal conduct and unethical practices and conduct prejudicial to the administration of justice among members of the Kings County Bar. In furtherance of its duties, the Judicial Inquiry was empowered to subpoena witnesses, to transcribe testimony under oath, and to examine the records required to be maintained by attorneys pursuant to the Appellate Division's Special Rules, *supra*.

4. *The Facts and Proceedings Below*

In the period from 1953 to 1957, Petitioner filed, as required by the rules of the Appellate Division, 735 statements of retainer in contingent fee cases. In 1958, the Judicial Inquiry sought to inquire into the circumstances surrounding the obtaining of such an unusually high number of retainers. On June 2, 1958, it served a subpoena *duces tecum* on Petitioner calling for production of certain books and financial records pertaining to his practice as an attorney in personal injury actions and required to be preserved by Rule 5 of the Special Rules. Petitioner's motion to quash the subpoena was litigated in a separate proceeding which resulted in a denial of his challenge to its validity, *Anonymous No. 14* v. *Arkwright*, 7 A. D. 2d 874 (2d Dept. 1958), *motion for leave to appeal denied*, 5 N. Y.

2d 710 (1959), *cert. denied*, 359 U. S. 1009 (1959). Moreover, in affirming Petitioner's disbarment, the New York Court of Appeals held that the records specified in the subpoena were "records required by law to be kept by him", *Matter of Spevack*, 16 N. Y. 2d 1048, 1050 (1965).

Petitioner ultimately refused unconditionally to comply with any part of the subpoena. He declined "to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty . . ." (R. 117). Petitioner was disbarred for failing to comply with a condition of his license as an attorney that he preserve and produce, upon demand by the court, records relating to his contingent fee retainers. On this writ of certiorari, he attacks the imposition of discipline as unconstitutional under the self-incrimination clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and the due process and equal protection clauses of the Fourteenth Amendment.

Summary of Argument

1. The New York courts have consistently disciplined attorneys for failure to answer questions relevant to their professional conduct regardless of the reason asserted for such failure. It is clear that petitioner was disciplined for failure to answer such relevant inquiries and not for invoking the privilege against self-incrimination.

2. A condition of an attorney's license to practice is the requirement that he answer relevant inquiries concerning his professional conduct. Such requirement is necessary

to enable the State adequately to carry out its responsibility of supervising the Bar to assure clients that attorneys it licenses are ethical.

The role of the State in supervising contingent fee practices is particularly important to the poor and the uneducated who are the principal beneficiaries of this method of financing personal injury litigation. These are the very persons who are least likely to know their rights or have the capacity to protect their interests, *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The privilege against self-incrimination does not insulate an individual from reasonable conditions imposed upon the continuance of his license.

3. Petitioner was required by the Special Rules of the Appellate Division to maintain the records which he refused to produce. Since they were required to be maintained by law, these documents do not fall within the protection of the privilege against self-incrimination, *Shapiro* v. *United States*, 335 U. S. 1 (1948).

4. The disciplining of an attorney for failure to answer inquiries relevant to his professional conduct does not violate the due process and equal protection guarantees of the Constitution. The requirement that such inquiries must be answered is a reasonable condition attendant upon special status.

ARGUMENT

I.

Petitioner was subjected to discipline solely by reason of his failure to comply with the requirement that he answer inquiries relevant to his professional conduct upon which his license was contingent and not for invoking the privilege against self-incrimination.

Petitioner concedes that the New York courts have consistently disciplined attorneys for failure to answer inquiries concerning their professional conduct regardless of the grounds therefor (Pet. Br. p. 35).* The logical conclusion to be drawn from such uniformity is that Petitioner was disciplined for his failure to answer relevant inquiries rather than for his invocation of the privilege against self-incrimination. Thus, he was subjected to discipline in exactly the same manner as if he had simply not appeared or had refused to answer a relevant question without advancing any reason. No unusual or novel sanction resulted because the failure to answer was predicated upon the privilege against self-incrimination.

---

* Petitioner advances the theoretical argument that an attorney might be disciplined for invoking the attorney-client privilege. There is an important distinction between invoking the attorney-client privilege and invoking the privilege against self-incrimination. The former privilege is that of the client, *not* the attorney, and the attorney's *failure* to assert that privilege warrants discipline (Canon 37 of the Canons of Professional Ethics).

II.

The shield of the privilege against self-incrimination may not be invoked as a sword to strike down reasonable requirements imposed by law attendant upon the continued maintenance of rights granted by the State.

Implicit in the very concept of licensing is recognition of a public interest in the occupations, activities and professions with respect to which it exists. Government, on behalf of the public, supervises those who are granted the right to earn a livelihood in areas of public interest.

The attorney is given the right, by virtue of his license, to earn a living on the basis of his access to the courts and other facilities publicly created and maintained for the administration of justice. The State, in conferring this right, attaches the condition that the attorney will answer whenever his use of that right is questioned in an authorized inquiry. This requirement is reasonable not only in theoretical terms but also in view of the history of the contingent fee and its abuses in New York State,* as set forth, *supra*. Indeed, Petitioner concedes that he has a duty to be candid and cooperative with the Court (Pet. Br. p. 27).

The requirement of cooperation with any authorized inquiry pertaining to the rights granted under a license is not peculiar to attorneys. It may fairly be stated that it is a universal requirement attendant upon the issuance of

---

* The English exercise even more supervision. They require that solicitors maintain complete books and records concerning their practice which must be audited annually [Solicitors Act, 1957 (5 & 6 Eliz. 2 C. 27), §30].

any license. In fact, many rights created by license are subject to periodic renewal conditioned upon the submission of certain information bearing upon past and future use of the license, i.e., permits to carry concealed weapons or to operate an automobile.

It is axiomatic that the entire system of licensing depends, in large measure, upon information obtained by inquiries directed to the licensee. Petitioner contends that where the failure of the licensee to respond is predicated upon the privilege against self-incrimination, the requirements of the State are nullified, and the State is compelled to continue the license in full force despite such failure. Such a conversion of the privilege against self-incrimination from a shield into a sword is not only unwarranted by the scope of the privilege as developed in decisions of this Court, but would effectively destroy the administrative process.

While *Malloy* v. *Hogan, supra,* held that the Fifth Amendment is applicable to state proceedings, it is not determinative of the scope of the privilege against self-incrimination. Expansion of the privilege as urged by Petitioner would require the Appellate Division, in the instant case, to continue to certify him as an attorney in good standing despite his refusal to comply with the requirement that he produce records concerning his conduct as an attorney. A logical extension of Petitioner's contention would also require the State to continue a license to carry a concealed weapon when the owner refuses to answer on the ground of self-incrimination such actual requests for information as (1) "State reasons for license" or (2) "Since the issuance of your current pistol license have you used narcotics, barbiturates or suffered from any mental

disorders".* Similarly, the State would be required to continue a driver's license when the driver refuses to answer on the ground of self-incrimination the question, "Have you ever had a learner's permit or a license to operate a motor vehicle refused, suspended or revoked, cancelled or an application for a Driver License denied, in this State or elsewhere?" ** In fact, all positions of trust to which an individual might be appointed by the State would be similarly affected. Thus, for example, if Petitioner's contention is followed, a trustee of funds who refused to account on the ground of self-incrimination could not be removed by the court which appointed him.

Petitioner's contention that reasonable requirements imposed by law upon a licensee may not be enforced where refusal to comply is predicated upon constitutional grounds has even more far-reaching implications since such a doctrine could not logically be limited to the privilege against self-incrimination. For instance, substantial portions of the Canons of Ethics might conceivably be struck down on the ground that they restrict the attorney's freedom of speech guaranteed by the First Amendment (see Canons 1, 7, 9, 20, 27 and 37 adopted by the American Bar Association).

Petitioner, therefore, finds himself compelled to argue (Pet. Br. p. 37) that requiring the State to continue to certify him as an attorney, despite his failure to reply to relevant inquiry, would not substantially impede the State's conceded interest in maintaining desired standards of con-

---

* Form L. D. 39B (Rev. 10/58), Division of Licenses, Police Department, City of New York.

** Form MV-43 (9/64), New York State Department of Motor Vehicles.

duct by its attorneys. Petitioner contends that the State could with little difficulty examine the Statements of Retainer which he has filed pursuant to the rules of the court and could ascertain therefrom sufficient information* to conduct an independent investigation case by case. This would require a search through court records, insurance company files, and other sources, to determine whether any evidence of misconduct exists. The practical difficulties of such a procedure are evident when an attorney, such as Petitioner here, has filed over 700 Statements of Retainer within a period of five years. Moreover, adoption of Petitioner's view of the scope of the privilege against self-incrimination would undermine the very procedure he himself suggests. Thus, if the privilege against self-incrimination is applicable to the records here in question, it would be equally applicable to the requirement that Statements of Retainer be filed. This result necessarily follows since the answers required in the Statement of Retainer could lead the State, as Petitioner suggests, to the very information contained in his records which he contends would incriminate him.

In arguing that the State could rely on independent investigation, Petitioner raises grave due process questions. Such procedures would require that investigations of attorneys, presently made confidential by statute, would become generally known among the attorney's clients, carriers, doctors, *et al.* Such a general inquiry could destroy the attorney's professional reputation to an extent that subsequent exoneration, if warranted, could not repair—

---

* The information provided therein included the name of the client, the name of the prospective defendant, the person or persons who referred the client and the terms of the agreement for compensation.

"Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored", Cardozo, Ch. J. in *People ex rel. Karlin* v. *Culkin, supra,* at 478. Further, the institution of such a sweeping investigation as a result of the attorney's invocation of his privilege might, under Petitioner's thesis, also constitute a penalty for its invocation and hence would be barred. If so, the scope of the privilege would be so far expanded as to insulate from investigation an attorney who invokes it.

Such an expansion of the scope of the privilege against self-incrimination, resulting in the virtual elimination of effective licensing procedures, finds no support in any prior decisions by this Court. The opinions cited by Petitioner generally concern procedures in *criminal* cases which violate the privilege [(*Bram* v. *United States,* 168 U. S. 532 (1897) (coerced confession); *Gouled* v. *United States,* 255 U. S. 298 (1921) (illegally seized evidence); *Wan* v. *United States,* 266 U. S. 1 (1924) (coerced confession); *Smith* v. *United States,* 337 U. S. 137 (1949) (introduction of prior testimony obtained under circumstances which conferred immunity by operation of law); *Griffin* v. *California,* 380 U. S. 609 (1965) (prosecutor's comment on defendant's failure to testify at criminal trial)] and the circumstances under which the privilege may be invoked [(*Boyd* v. *United States,* 116 U. S. 616 (1886) (claimant in federal seizure and forfeiture proceeding may invoke privilege); *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892) (grand jury witness may invoke privilege); *Brown* v. *Walker,* 161 U. S. 591 (1896) (a grand jury witness afforded complete immunity from prosecution may not invoke privilege); *McCarthy* v. *Arndstein,* 262 U. S. 355 (1923) (witness in bankruptcy proceeding may invoke privilege); *United States* v. *White,*

322 U. S. 694 (1944) (union officer may not invoke privilege to prevent production of his union's records pursuant to grand jury subpoena); *Hoffman* v. *United States*, 341 U. S. 479 (1951) (grand jury witness may invoke privilege where answers to inquiry might furnish link in chain of evidence needed to prosecute him for crime); *Quinn* v. *United States*, 349 U. S. 155 (1956) (witness before legislative committee may invoke privilege); *Ullman* v. *United States*, 350 U. S. 422 (1956) (a grand jury witness afforded complete immunity from prosecution may not invoke privilege); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (witness in state criminal investigation may invoke privilege)].

This Court's determination in *Slochower* v. *The Board of Education*, 350 U. S. 551 (1956), relied upon by Petitioner (Pet. Br. p. 26), is not dispositive of the issues. Unlike *Slochower*, we are not dealing here with a statute or state procedure which "operates to discharge every city employee who invokes the fifth amendment." Thus, the mere invocation by an attorney of the privilege against self-incrimination outside the context of an inquiry into his professional conduct, as for example before a grand jury, would not in and of itself warrant discipline, *Matter of Solovei*, 276 N. Y. 647 (1938) affirming 250 App. Div. 117 (2d Dept. 1937). The instant matter involves relevant inquiries directed at Petitioner by the agency which granted his license and supervises his professional conduct. In *Slochower*, the Court recognized that under such factual circumstances a different result might be warranted. Thus, the Court there stated (at page 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was an-

nounced as not directed at the property, affairs, or government of the city . . . ".

The indigent and uneducated are most likely to become involved in the processes of the law in the personal injury and criminal fields. It is, therefore, of particular importance that counsel in these fields be ethical, for, as this Court recognized in *Miranda* v. *Arizona*, 384 U. S. 426 (1966), the poor and the ignorant are least likely to know their rights or have the capacity to protect their interests. The client in personal injury cases, unversed in the law, has no frame of reference by which to evaluate the conduct of counsel. Moreover, if he should discover unethical behavior by his attorney during the course of the litigation, his rights may have been unalterably damaged. Thus, the client must rely primarily upon the State to vouch for the integrity and ethical conduct of his attorney. That is precisely what the State is attempting to do in this matter, where its efforts are directed to maintaining the ethical standards and integrity of the Bar. In *Miranda*, the State played quite a different role by countenancing practices which effectively deprived the indigent and uneducated of the right to counsel.

Proper representation by counsel fully and solely devoted to the client's interests is fundamental to the administration of justice. This concept underlies the Court's opinion in *Miranda* and, as we have shown, the scope of the privilege against self-incrimination in no sense requires that this principle be eroded so soon after its pronouncement.

III.

The documents which Petitioner refused to produce were, in any event, not subject to the privilege against self-incrimination.

The records which Petitioner refused to produce concerned transactions which were subject to the supervisory power of the Appellate Division. Furthermore, they were documents which the Special Rules of the Appellate Division required him to maintain. Under *Shapiro* v. *United States*, 335 U. S. 1 (1948), such documents constitute "required records" and are outside the scope of the privilege against self-incrimination. In *Shapiro*, the Court, in quoting from its prior opinion in *Davis* v. *United States*, 328 U. S. 582, 589-90 (1946), stated (335 U. S. 1, at 17):

> "'the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of the character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.'"

We have already shown that a reasonable basis exists for requiring that such records be maintained by attorneys. This is necessary to permit the State to exercise its legitimate responsibility to supervise the conduct of attorneys which it licenses. In the circumstances, it is respectfully submitted that under the doctrine of *Shapiro* the records in question are not subject to the privilege and, consequently, no constitutional right is violated by the imposition of discipline for refusal to produce them.

Petitioner's reliance upon this Court's decision in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), to support his contention that the *Shapiro* doctrine is no longer valid is misplaced. In that case, the Subversive Activities Control Board ordered Albertson to register as a member of the Communist Party. This act of registration alone, the Court concluded, could be used to prosecute and convict him under the membership clause of the Smith Act. Thus, the Board was specifically requiring Albertson to perform an act which in and of itself would incriminate him. Unlike *Albertson,* Petitioner was not compelled to perform an act which in and of itself would incriminate him. He merely was required, under the Special Rules of the Appellate Division, to maintain certain books and records relating to his personal injury cases.

In his efforts to extricate himself from the *Shapiro* doctrine, Petitioner states (Pet. Br. p. 54):

> "Subject to the requirements of other constitutional provisions, the government could still require the keeping of records, and such records could be withheld from production only by natural persons who chose to claim the privilege and as to whom the government

was unwilling to grant immunity. There would be no effect upon the principal subjects of regulatory programs, since corporations and unincorporated associations such as labor unions and partnerships are not entitled to claim the privilege."

Petitioner thereby summarily dismisses the importance of supervising the official conduct of all "natural persons" in public and quasi-public positions of trust. Thus, *while retaining his position of trust,* the attorney could refuse to account to his client; the justice of the peace could refuse to report fines he has collected; and the druggist could refuse to report his sales of narcotic drugs; and, in each case, the individual is, as a practical matter, the exclusive repository of the information surrounding the transaction.

IV.

Petitioner's disbarment did not violate either the due process or equal protection clauses of the Fourteenth Amendment.

Under Point II, *supra,* we have pointed out that the requirement that attorneys answer relevant inquiries protects each citizen from improper legal representation. The necessity for this requirement is underscored by the client's ignorance of his rights; his reluctance to jeopardize the relationship with his attorney by filing a complaint; and the intricacies of legal practice which make it difficult for a layman to evaluate his attorney's conduct.

In these circumstances, it is respectfully submitted that the State's requirement that attorneys answer relevant inquiries is a rational and valid exercise of the State's power

within the meaning of the due process clause, see *Liggitt Co.* v. *Baldridge*, 278 U. S. 105, 111-112 (1928).

Under Point I, *supra*, we have shown that it is the attorney's failure to answer relevant inquiries, rather than his invocation of the privilege, which results in discipline. We have further pointed out that, in granting a license to an attorney the State affords him the opportunity to earn a private living in a public sector of the community—the administration of justice. The attorney's license is conditioned upon a requirement that he answer all relevant inquiries. If he does not, the condition is violated and the license terminated. The attorney is thereby subjected to no more or less than a reasonable condition attendant upon special status. This we submit is in no sense a deprivation of equal protection of the law.

If the standards required of an attorney were limited to those applicable to ordinary citizens, the Canons of Ethics would be nullified. The standards of the market place, however, have never fixed the limits by which the propriety of an attorney's conduct is measured.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

JOHN G. BONOMI
Attorney for The Association of the Bar of the City of New York as Amicus Curiae

MICHAEL FRANCK
PETER J. O'CONNOR
Of Counsel